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IN THE

Supreme Court of the United States

No. 174.

October Term, 1947.

ROBERT SEALFON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

ROBERT T. McCRACKEN,
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I.

Petitioner submits that the Government misapprehends the question presented by the Petition. As stated in its Brief (p. 2) the question is whether Petitioner's acquittal of conspiracy to defraud the United States by uttering false invoices to a ration board is a *bar* to his subsequent conviction of aiding and abetting one who uttered the same invoices.

Petitioner specifically conceded that this was not the question (Petition and Brief, p. 20). This misapprehension runs through the Government's whole argument. The Government labors the point that guilt as aider and abettor is different from and does not necessarily flow from conspiracy. Petitioner agrees. One may be an aider and abettor either because he has conspired with his principal or because he has done acts knowingly and with criminal intent which aid and abet that principal or on both grounds. Because of this the Government asserts that acquittal of conspiracy does not necessarily bar a conviction for aiding and abetting. Again petitioner agrees in view of *Pinkerton v. United States*, 328 U. S. 640.

But this does not mean that acquittal of conspiracy has *no* effect thereafter. This question was not involved in the *Pinkerton* case. Previous acquittal of conspiracy does have at least two effects: (1) It *bars* a subsequent conviction of aiding and abetting where such conviction rests solely upon the existence of the conspiracy of which petitioner was previously acquitted. The Pinkerton case inferentially recognized this situation. Mr. Justice Douglas, speaking for the Court, said:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy . . . But as we read this record that is not this case."

But that is precisely the instant case, for the first trial established that Petitioner was not party to the conspiracy. Hence, nothing done in his absence could impose vicarious criminal liability on him. (2) It estops the Government from contending (and the jury from finding) in the subsequent trial that defendant is guilty of aiding and abetting on the basis of the same conspiracy even though there is other evidence from which guilt could be inferred independent of that conspiracy.

The Government says:

> "In the instant case, even if it may be assumed that the jury's verdict in the prior case was susceptible of no other interpretation than that they found that petitioner did not conspire with the Greenbergs, a matter not free from doubt under the record in that case (supra, pp. 7-8), . . ."

But it is submitted there is no doubt whatever on this point. The Government on pp. 7-8 of its Brief, referred to in the above quotation, attempts to show that there was some lack of clarity in the trial judge's instructions at the first trial. Even if that is so it is of no consequence.

The verdict settled the charge made by the indictment. And it is beyond doubt, and the Government has conceded, that the conspiracy charged was a conspiracy to do the very acts which the substantive indictment charged were done. The judgment of acquittal cannot be impeached *by the prosecution* on an asserted inaccuracy in the charge. It is not open to the prosecution to comb the record of the conspiracy trial in an attempt to demonstrate that that trial settled nothing. To permit this would be to allow a collateral appeal where a direct one is forbidden. The Government's Brief recognizes the validity of this position. On page 10 appears this statement:

> ". . . it is clear that the Government was not seeking in the present case, as in Pinkerton v. United States, 328 U. S. 640, 645, to impose responsibility upon petitioner for the Greenbergs' offenses upon a conspiratorial basis. If that had been so the verdict of acquittal of conspiracy with the Greenbergs would presumably, by virtue of the doctrine of res judicata, have been fatal to the conviction of petitioner for the Greenbergs' crimes."

The Government then argues that in the present case there *is* evidence which sustains the petitioner's conviction even if the conspiracy theory is disregarded. Petitioner thinks not; but even if petitioner is wrong in this, his position is no less valid. Throughout its Brief the Government gives lip service to the words "res judicata" but argues as though the fundamental principle embodied in them is identical with either double jeopardy or former acquittal. This, in Petitioner's submission, is the root of the misconception of the case in the trial court, in the Circuit Court of Appeals and in the Government's present position.

In support of its contention the Government says (p. 11) that:

> "The letter of March 3, 1943 (supra, pp. 4-5), was itself clearly a sufficient act of aid and assistance, for it assured the Greenbergs of petitioner's cooperation, and served as a 'cover-up' in case their fraudulent sugar replacement applications should be questioned by the O. P. A."

But a reading of the letter will amply demonstrate that on its face it is clearly insufficient to show that it was a "cover-up." It is by reference to the testimony of an antecedent agreement or conspiracy between Greenberg and Sealfon as to this letter and the purpose of its writing that the petitioner can be tied in as an aider and abettor. But, again, even if petitioner is wrong in this he is certainly right in saying that the Government relied throughout the trial, as did the trial judge in his charge, on the alleged "corrupt deal" (R. 141-146), "arrangement" (R. 142, 150, 151, 152, 154, 186, 209), the "plan" (R. 529, 530) to show guilt of aiding and abetting.

After drawing distinctions between conspiracy and aiding and abetting which would have compelled the despairing admiration of a scholastic philosopher, the Government says (Brief, p. 11):

> "In none of these aspects of aiding and abetting did the guilt of petitioner depend in any respect upon the existence of a conspiracy between him and the Greenbergs, and the charge to the jury was appropriately devoid of any instructions on conspiracy law."

If this is so it certainly is odd that the Government prosecutor throughout the trial used the words "deal", "arrangement", "plan" and although the court may not have used the word "conspiracy" in the instructions, it is clear that that was the theory upon which the issue was submitted. Speaking of the alleged conversation between Greenberg and petitioner the court said that this "discussion which was had between Greenberg and Sealfon is

the crux of this situation" (R. 550). The Government *now* says that in relying upon these discussions it was relying not upon a conspiracy but upon "arrangements"! (Brief, p. 12).

Again, distinguishing conspiracy and aiding and abetting, the Government says (Brief, p. 12) "The two concepts equally result in responsibility for substantive crime (cf. *Pinkerton v. United States*, supra), but each depends upon different factors." Since this is so why was not the one factor, to wit, conspiracy, entirely eliminated from the trial of the substantive crime by reason of the former acquittal? Even if the Government is correct in saying that the evidence justified conviction either because of conspiracy *or* acts of assistance, nevertheless the former had to be eliminated as a factor in the second trial because of the result of the first.

It is universally recognized that a conviction which rests upon alternative grounds, one valid and the other invalid, cannot stand. An appellate court is unable to determine upon which ground the jury based its verdict. As this Court stated in *Kotteakos v. United States*, 328 U. S. 750, 765:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

II.

For some reason the Government, in its opposition Brief, has taken no notice of that part of petitioner's argument (commencing at p. 24) to the effect that petitioner was denied the right of producing evidence in his own behalf. The importance of this question is indeed emphasized by the Government's Brief in opposition.

If it be true, as the Government contends, that petitioner's guilt could be predicated either upon conspiracy

or upon acts of assistance, then certainly it was his right to prove by any proper evidence, oral or documentary, that at least he was not party to a conspiracy. Evidence is not inadmissible because it does not constitute a defense to the whole of the charge. It seems to petitioner that the refusal of the court to permit him to prove by record proof that he had not entered into any agreement with Greenberg as to which it had submitted evidence, is a particularly aggravated violation of the right which belongs to everyone subject to our Constitution of producing competent evidence in his own behalf.

Petitioner repeats that his position on this score is equally valid whether the Government relied upon, and had the right to rely upon, the theory of conspiracy alone or upon both conspiracy and acts of aiding and abetting.

Respectfully submitted,

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